Guideline Sentencing Update

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Apprendi Issues

Supreme Court holds that failure to allege quantity in indictment may be subject to plain error review. Following *Apprendi v. New Jersey,* 530 U.S. 466 (2000), courts have held that drug quantity is an element of the offense that must be charged in the indictment and proved beyond a reasonable doubt. Some circuits had held that failure to charge quantity in the indictment cannot be harmless error because it deprives a court of jurisdiction to sentence a defendant to a term greater than the maximum that applies when no specific threshold drug quantity has been charged or proven, even if there are stipulations to or overwhelming evidence of a larger quantity. *See U.S. v. Cotton,* 261 F.3d 397, 404–07 (4th Cir. 2001); *U.S. v. Gonzalez,* 259 F.3d 355, 360 at n.3 (5th Cir. 2001). The Supreme Court granted certiorari in *Cotton* to "address whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court."

The Court unanimously reversed, holding that "defects in an indictment do not deprive a court of its power to adjudicate a case." The Court therefore "appl[ied] the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim." Although the indictment charged a conspiracy to distribute "a detectable amount of cocaine and cocaine base," respondents were sentenced for more than fifty grams and received sentences above the twenty-year maximum applicable to the lowest quantities under 21 U.S.C. § 841(b). Under *Apprendi*, then, there was plain error that arguably affected respondents' substantial rights.

However, "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. . . . The evidence that the conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted.' . . . Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base." The Court added that, in light of the graduated penalties in § 841(b), "[t]he real threat . . . to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial."

U.S. v. Cotton, 122 S. Ct. 1781, 1783–87 (2002). See also cases in 11 *GSU* #3 affirming sentences despite *Apprendi* error where there was overwhelming or uncontroverted evidence of drug quantity.

Mandatory Minimum Sentences

Supreme Court affirms mandatory minimum sentence imposed by court under preponderance standard, holds *Apprendi* did not overrule *McMillan.* Petitioner was convicted of carrying a firearm during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A). The sentencing court found that petitioner "brandished" the firearm and imposed the seven-year mandatory minimum sentence required by § 924(c)(1)(A)(ii). Petitioner appealed, arguing that brandishing was an element of a separate offense that had to be charged in the indictment and proved at trial. He also argued that if brandishing is a sentencing factor as a statutory matter, the statute is unconstitutional in light of *Apprendi*. The Fourth Circuit affirmed the sentence, holding that the statute makes brandishing a sentencing factor that, under *McMillan v. Pennsylvania,* 477 U.S. 79 (1986), may be used to impose a mandatory minimum sentence. *See U.S. v. Harris,* 243 F.3d 806, 809–12 (4th Cir. 2001).

In a sharply divided opinion, the Supreme Court affirmed. Based on the statute's structure, text, and history, the majority first held that, "as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense. The statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." Therefore, "the statute does just what *McMillan* said it could" by imposing minimum sentences within the statutory maximum.

A four-justice plurality next concluded that *McMillan* is not inconsistent with *Apprendi* (Justice Breyer concurred in the judgment but did not join this part of the opinion). "Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries—and without contradicting *Apprendi*."

"Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis.

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Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings. It is critical not to abandon that understanding at this late date."

Four justices dissented, stating that *McMillan* conflicts with *Apprendi* and should be overruled, with *Apprendi* being extended to cover facts that increase a defendant's mandatory minimum sentence.

Harris v. U.S., 122 S. Ct. 2406, 2412–20 (2002).

Previously, the Sixth Circuit had held that *Apprendi* applies generally to the imposition of mandatory minimum sentences. See summaries of *Flowal* and *Ramirez,* and summaries of cases that disagreed, in 11 *GSU* #3.

Before *Harris,* the Second Circuit held that "if drug quantity is used to trigger a mandatory minimum sentence that exceeds the top of the Guideline range that the district court would otherwise have calculated (based on the court's factual findings, with or without departures), that quantity must be charged in the indictment and submitted to the jury." *U.S. v. Guevara,* 277 F.3d 111, 116–23 (2d Cir. 2001) (remanded). After *Cotton* and *Harris* were decided, the Second Circuit reheard and amended the case, finding that *Cotton* required affirming the sentence because the evidence of drug quantity was overwhelming and therefore supported the sentence imposed. The court "d[id] not consider the impact (if any) of *Harris* on the *Apprendi* analysis set out in" its earlier opinion. *U.S. v. Guevara,* 298 F.3d 124, 127–28 (2d Cir. 2002).

See *Outline* generally at II.A.2.a and c

Departures

Mitigating Circumstances

First Circuit holds that defendant must be "irreplaceable" for departure based on extraordinary family responsibilities. Defendant's guideline range was 21–27 months. The district court granted a downward departure under USSG § 5H1.6 for defendant's extraordinary family ties and responsibilities, namely, the need for him to provide care for his elderly parents. Departing six levels, the court sentenced him to three years' probation and six months' home detention, to be served on weekends.

The appellate court reversed, concluding that defendant's situation "falls short of what the caselaw has defined as 'extraordinary circumstances.'" Although defendant's efforts are "significant and commendable, . . . it is the unfortunate norm that innocent family members suffer considerable hardship when a relative is incarcerated." To remove a case from the "heartland" of the applicable guideline, "[a]t the very least, the caselaw requires a showing that the defendant is irreplaceable before his circumstances are considered extraordinary." Unlike cases cited by the court that approved departures where a defendant was shown to be irreplaceable, "the instant case is replete with evidence demonstrating alternative sources of care for Pereira's parents."

U.S. v. Pereira, 272 F.3d 76, 81–83 (1st Cir. 2001). *See also U.S. v. Sweeting,* 213 F.3d 95, 105 (3d Cir. 2000) (vacating departure based partly on defendant's care of a son with Tourette's Syndrome, stating "there simply is nothing about the type of care that he requires that suggests to us that it is so unique or burdensome that another responsible adult could not provide the necessary supervision and assistance"); *U.S. v. Faria,* 161 F.3d 761, 762–63 (2d Cir. 1998) (stating that downward departure under § 5H1.6 has been allowed where "the family was uniquely dependent on the defendant's ability to maintain existing financial and emotional commitments," but remanding departure here because this defendant's family was not "uniquely dependent on the support it currently receives from him"). *But cf. U.S. v. Dominguez,* 296 F.3d 192, 195–200 (3d Cir. 2002) (remanded: distinguishing *Sweeting* in holding that district court could have departed for defendant whose elderly and infirm parents "were physically and financially dependent upon her" and there was "no [other] family member who could help and there are no funds to employ outside assistance").

See *Outline* at VI.C

Adjustments

Multiple Counts—Grouping

Several Circuits hold that money laundering amendments are not to be applied retroactively. Effective Nov. 1, 2001, Amendment 634 significantly altered the guidelines for money laundering. It merged § 2S1.2 into a revised §2S1.1, tied offense levels more closely to the underlying criminal conduct, and directed courts to group money laundering counts with the underlying offenses that generated the laundered funds. Some defendants sentenced before Amendment 634 took effect have claimed on appeal that their sentences should be vacated and the amendment applied at resentencing to allow them to benefit from an allegedly lower offense level calculation or by having their offenses grouped.

The circuits to decide the issue have concluded that Amendment 634 did not merely clarify the guideline, so as to allow retroactive application, but imposed substantive changes that are not to be applied retroactively. The Eighth Circuit, for example, stated that "considering the amendment's language, its effect and purpose, and the earlier version, we conclude amendment 634 substantively changes the Guidelines." The court added that the Commission "did not include amendment 634 in the list of amendments to be applied retroactively. *See* USSG § 1B1.10(c) (2001). Also, the amendment's commentary does not state the amendment is intended to clarify, but

instead reflects substantive intent." *U.S. v. King,* 280 F.3d 886, 891 (8th Cir. 2002). *Accord U.S. v. Descent,* 292 F.3d 703, 707–09 (11th Cir. 2002); *U.S. v. McIntosh,* 280 F.3d 479, 485 (5th Cir. 2002); *U.S. v. Sabbeth,* 277 F.3d 94, 96–99 (2d Cir. 2002) (also rejecting claim that direction to group offenses was merely clarifying). *Cf. U.S. v. Martin,* 278 F.3d 988, 1003–04 (9th Cir. 2002) (where defendant's sentence is remanded for other reasons, decision whether to group money laundering and mail fraud offenses on resentencing should be determined under amended § 2S1.1).

See *Outline* at III.D.1

Using Minor to Commit Crime

Courts address several issues arising under § 3B1.4. USSG § 3B1.4 calls for an increase of two offense levels if defendant "used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense." Some circuits have held that § 3B1.4 does not require that a defendant know that the minor is, in fact, under age eighteen. The Eleventh Circuit looked to the similarly worded 21 U.S.C. § 861(a), which has been held to not contain a scienter requirement. "We see no reason why section 3B1.4 of the Sentencing Guidelines should be interpreted to give less protection to minors than similarly worded federal statutes, absent a showing of Congress's contrary intent. . . . We find no qualifying language in section 3B1.4 reserving the enhancement for defendants who knew that the person drawn into their criminal activity was a minor."

The court also held that a defendant need not be the one to actually involve the minor in the offense. "Any defendants who could have reasonably foreseen the use of a minor . . . are culpable under the plain language of sections 3B1.4 and 1B1.3(a)(1)(B)." The enhancement was affirmed here because defendant was a leader of the conspiracy and the recruitment of minors by an underling was reasonably foreseeable to defendant.

U.S. v. McClain, 252 F.3d 1279, 1285–88 (11th Cir. 2001). *Accord U.S. v. Gonzalez,* 262 F.3d 867, 870 (9th Cir. 2001) (affirmed: "plain language of the guideline does not require that a defendant have knowledge that the individual is under eighteen"). *See also U.S. v. Patrick,* 248 F.3d 11, 27–28 (1st Cir. 2001) (affirmed: "because [defendant] was convicted of conspiracy, his sentence could be enhanced based on his co-conspirators' reasonably foreseeable use of juveniles to further the [conspiracy's] activities").

The Fourth Circuit rejected a claim by an eighteen-year-old defendant that the Sentencing Commission exceeded its authority in making § 3B1.4 apply to all defendants when the legislation directing the Commission to act referred to "a defendant 21 years of age or older." The court reasoned that, "because Congress did not direct that *only* defendants over age 21 receive the enhancement, it actually did *not* require the Commission to limit the application of § 3B1.4 to defendants of a certain age."

U.S. v. Murphy, 254 F.3d 511, 513 (4th Cir. 2001). *Accord U.S. v. Ramsey,* 237 F.3d 853, 855–58 (7th Cir. 2001). *Contra U.S. v. Butler,* 207 F.3d 839, 849–52 (6th Cir. 2000) (remanded: "Commission failed to comport with a clear Congressional directive when it eliminated the requirement that the defendant be at least twenty-one years old to be subject to . . . § 3B1.4"; however, defendant was not shown to "use" minor and thus § 3B1.4 did not apply).

The circuits have disagreed on whether defendant must take some action beyond merely partnering with a minor in committing the offense. The Sixth Circuit determined that § 3B1.4 did not apply where a defendant committed a bank robbery with a minor but there was no evidence that it was not a simple partnership. "A consideration of the definitions of 'use' supports the notion that § 3B1.4 would require more affirmative action." For example, placement of § 3B1.4 in the "Adjustments" section, and the legislation's use of the term "solicitation of a minor," implies that a defendant must "play a particular role in the offense" and "do more than simply participate in crime with a minor. . . . Congress likely imagined an offender who actually exercised some control or took some affirmative role in involving the minor. . . . Thus, . . . 'using' a minor to carry out criminal activity entails more than being the equal partner of that minor."

U.S. v. Butler, 207 F.3d 839, 847–49 (6th Cir. 2000) (remanded because court did not find that defendant "directed, commanded, intimidated, counseled, trained, procured, recruited, or solicited" the minor). *Accord U.S. v. Parker,* 241 F.3d 1114, 1120–21 (9th Cir. 2001) (agreeing with *Butler* in remanding: "The district court's finding was that Parker and [the minor] were merely co-conspirators. The fact that Defendant was the minor's partner and profited from his participation in the crime does not show that he acted affirmatively to involve" the minor). *See also U.S. v. Suitor,* 253 F.3d 1206, 1210 (10th Cir. 2001) (although facts showed that defendant did in fact "use" minors in his offense, court cited *Parker* for proposition that evidence "must demonstrate more than the simple fact that Suitor was involved in a conspiracy with the minors").

However, the Seventh Circuit disagreed, concluding that a defendant "uses" minors "if his affirmative actions involved minors in his criminal activities. . . . This test can be met when the minor is a partner in the criminal offense. . . . By forming a partnership with a minor, a criminal defendant is undeniably encouraging that minor to commit a crime. The fact that the minor is a voluntary participant and equal does not make the act socially acceptable. . . . Thus, regardless of whether the minor is a partner or a subordinate, the enhancement will be applied where the defendant affirmatively involved the minor in the commission of a crime." The court held that

defendant not only encouraged the minor, but also directed and commanded him during the offense.

U.S. v. Ramsey, 237 F.3d 853, 859–62 (7th Cir. 2001).

Several circuits have held that the minor does not have to be an active, knowing, or willing participant in the crime. For example, the Ninth Circuit upheld the enhancement for using a child as a decoy to reduce the chance of detection, rejecting defendant's argument that "'active involvement or employment of the minor person in the offense' is required." Although the enabling statute directs the Sentencing Commission to enhance the sentences of defendants who use a minor "with the intent that the minor would commit a Federal offense," other wording that calls for enhancement "'if the defendant involved a minor in the commission of the offense,' is broad enough to cover intentionally using a minor as an innocent decoy. . . . [A] minor's own participation in a federal crime is not a prerequisite to the application of §3B1.4. It is sufficient that the defendant took affirmative steps to involve a minor in a manner that furthered or was intended to further the commission of the offense." Here, the evidence supported the finding that defendant "used" his three-year-old son—by having him with him in his truck as he tried to bring a load of marijuana from Mexico into the United States—to "assist in avoiding detection of, or apprehension for, the offense."

U.S. v. Castro-Hernandez, 258 F.3d 1057, 1059–60 (9th Cir. 2001). *Accord U.S. v. Alarcon,* 261 F.3d 416, 423 (5th Cir. 2001) (affirmed: using children as decoys while attempting to drive marijuana into United States warranted §3B1.4 enhancement).

Along similar lines, some courts have held that the minor need not have knowledge that he or she is participating in a crime for §3B1.4 to apply. The Tenth Circuit affirmed the enhancement for a defendant who, without explaining why, paid a sixteen-year-old to pick him up at the airport and drive him and others around town to cash counterfeit checks. The court relied on the "clear and unambiguous" language of §3B1.4 to reject the argument that "defendant must inform the minor of the criminal purpose for which the minor's services are wanted and induce, or try to induce, the minor to commit the federal offense in question."

U.S. v. Tran, 285 F.3d 934, 937–38 (10th Cir. 2002). *See also U.S. v. Anderson,* 259 F.3d 853, 864 (7th Cir. 2001) (affirmed for embezzler who directed seventeen-year-old bank teller to unknowingly make improper withdrawals—§3B1.4 "focuses on whether the defendant used a minor in the commission of a crime, not whether the minor knew that he was being used to commit a crime"). *Cf. U.S. v. Warner,* 204 F.3d 799, 800–01 & n.2 (8th Cir. 2000) (finding enhancement appropriate for defendant who brought his eight-year-old daughter to drug deal with undercover officers and, when they balked at paying him before he went to get drugs, offered to leave his daughter with undercover agents as guarantee he would return).

[To be put in next *Outline* at new section III.B.10]

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